IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004830
FtT No: PA/00143/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 May 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AL (NIGERIA)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S McKenzie, Senior Presenting Officer
For the Respondent: Mr M Moriarty, Counsel, instructed by Duncan Lewis Solicitors

Heard at Field House on 12 April 2024

ORDER REGARDING ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, AL is granted anonymity.

No-one shall publish or reveal any information, including the name or address of AL, likely to lead members of the public to identify AL. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. In this decision the appellant is referred to as 'the Secretary of State' and the respondent as 'the claimant'.

2. The Secretary of State appeals a decision of Judge of the First-tier Tribunal Bart-Stewart ('the Judge'), sent to the parties on 31 August 2023, allowing the claimant's appeal on human rights (article 8 ECHR) grounds. This decision is dated 23 March 2022.

Anonymity Order

3. The Judge did not issue an anonymity order. It is unclear to this panel as to whether she was asked to consider anonymity.

4. Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 contains a power to make an order prohibiting the publication of information relating to the proceedings or of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.

5. The requirement that justice should be administered openly and in public is a fundamental tenet of the domestic justice system. It is inextricably linked to freedom of the press and so any order as to anonymity must be necessary and reasoned: *R (Yalland) v. Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin). The public enjoys a common law right to know about court proceedings and such right is also protected by article 10 ECHR.

6. We note the observation of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings, that defendants in criminal proceedings are usually not anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. The claimant in this matter was an adult when sentenced for the index offence. He has already been subject to the open justice principle in respect of his criminal convictions, which are a matter of public record and so considered to be known by the local community.

7. However, we observe that the Competent Authority accepted the claimant to be a victim of trafficking in November 2018. Under section 2(1)(db) of the Sexual Offences (Amendment) Act 1992, a person who has alleged that he has been trafficked contrary to section 2 of the Modern Slavery Act 2015 is entitled to the same life-long anonymity as an alleged victim of sexual assault. We observe that offences under section 2 of the 2015 Act have a wide extra-territorial reach as do investigations carried out by the Competent Authority. Consequent to statute we are satisfied that the claimant should be anonymised so that members of the public do not identify him as a person against whom the offence of trafficking had been committed.

8. We therefore make an anonymity order in respect of the claimant and the order is detailed at the beginning of this decision.

9. We consider that we can address issues arising in this matter without the requirement to name the claimant's child or other family members. To name them would permit the possibility of the jigsaw identification of the claimant.

Relevant Facts

10. The claimant is a national of Nigeria, and aged 30. He was granted entry clearance as a visitor and entered the United Kingdom on 26 September 2000, when aged 6. He had been present in this country for a few weeks short of 23 years by the date of the Judge's decision

11. He applied for leave to remain in the United Kingdom on 11 September 2003, whilst still a child. This was refused on 5 April 2004.

12. In March 2005 the claimant's 'father' ('C') was arrested on suspicion of facilitating fraudulent marriages. He was later convicted on a charge of conspiracy to defraud at a Crown Court in 2008 and sentenced to six years' imprisonment. The conviction concerned C obtaining residence permits for alleged spouses of EEA nationals who engaged in sham marriages. It later transpired that C is not the father of the claimant.

13. The appellant's 'brother', who accompanied him to the United Kingdom, was arrested in October 2007. It was subsequently established that he was not biologically related to the claimant. For the purpose of this appeal, it is accepted that both the claimant and his 'brother' were trafficked into the United Kingdom to reside with a person who was not a biological relative.

14. The claimant has several criminal convictions. In April 2008 he received a referral order for four months following a conviction for handling stolen goods. In July 2008 he received a supervision order running for eighteen months following convictions of attempted robbery and possessing an article with a blade or point in a public place. In December 2008 he received a conditional discharge for six months for possessing a class C drug (cannabis). On 31 March 2010 he received a conditional discharge for twelve months for theft shoplifting. The claimant was a minor at the time of these convictions.

15. As an adult he received in May 2012 a community order with curfew requirement and tagging for twelve weeks following two counts of common assault. In October 2013 he received a conditional discharge for twelve months for possessing a controlled class A drug (MDMA).

16. In May 2014, when aged 20, the claimant was convicted of the index offence, namely burglary and theft. He received a two-year custodial sentence to be served at a Young Offenders Institution. The sentencing judge remarked, *inter alia*:

> "This was no opportunistic offence, in my judgment. [The victim] had taken the precaution, ..., of installing closed-circuit television cameras. They were connected to a computer at the back of his shop and somebody had gone to the trouble of disabling two of those cameras meaning that there would be no evidence from them as to who was responsible and what was being taken during the course of that burglary.
>
> I have heard evidence from him. He tells me, and I accept it, that those cameras were disabled as a result of the wires leading to them which connected them to the computer being cut. He himself being a picture framer knows a neat job when he sees one. That is how he described the job that had been done on those two cameras. For that reason, I am quite sure, and I use the word 'quite' in the sense of completely, that a great deal of thought had gone into this burglary. The person who did it, or the people who did it, knew what was inside, knew where the cameras were and took something with them to ensure that they could be disabled.
>
> ...
>
> You when arrested were interviewed by the police and you denied being responsible, even though your fingerprints were found in two places where no legitimate customers could possibly have got. Not only did you deny being responsible, you also claimed to be elsewhere at the time. In support of that, you suborned your girlfriend into lying to the police. That she lied to the police this court knows, because she gave a statement to them supporting your alibi when it is perfectly clear that you now, by virtue of your plea of guilty, accept that you were responsible either by yourself or along with others.
>
> ...
>
> In the circumstances, the sentence in this case is one of two years' imprisonment. The reason for that sentence is because this case belongs in the highest category."

17. On 4 August 2015 the Secretary of State signed a deportation order. The claimant appealed against this decision and his appeal was dismissed by a panel of the First-tier Tribunal (Judge Ross and Judge Lobo) on 23 April 2015. Having concluded that the claimant was a persistent offender the panel did not find very compelling circumstances in respect of the claimant's article 8 ECHR appeal. The claimant was granted permission to appeal to the Upper Tribunal. The appeal was dismissed by a decision of Upper Tribunal Judge Pitt and Deputy Upper Tribunal Judge Hutchinson sent to the parties on 14 July 2015.

18. The claimant claimed asylum on 13 October 2015, and the following year was referred to the National Referral Mechanism (NRM) as a possible victim of trafficking. On 5 November 2018 the Competent Authority accepted him to be a victim of trafficking.

19. A decision refusing the claimant's asylum and human rights claim was issued by the Secretary of State on 25 November 2020. Following the service of a pre-action protocol letter on 7 January 2021, the Secretary of

State agreed to reconsider her decision. The claimant's application was refused on 23 March 2022. The Secretary of State applied section 72 of the Nationality, Immigration and Asylum Act 2002 and so considered that the establishment of refugee status under the 1951 UN Convention on the Status of Refugees would not prevent the claimant's removal from this country.

First-tier Tribunal Decision

20. The appeal came before the Judge sitting at Taylor House on 10 August 2023. The claimant attended and gave evidence, as did the maternal grandmother (J) of his daughter (T). He relied upon the contents of a report prepared by Dr Carlene Saffrey, forensic psychologist, dated 7 November 2022, and an expert report prepared by Dr Aidan McQuade, former director of Anti-Slavery International, dated 16 August 2022. The latter report addressed the asserted risk of re-trafficking from Nigeria.

Section 72 Certificate

21. The Judge concluded at [22]–[30] of her decision that the claimant did not constitute a danger to the community. She noted the evidence of J, in whose home he resides, as well as the fact that he has not offended since 2013. Additionally, the Judge also noted Dr Saffrey's opinion that the claimant was at low risk of general offending, had matured, was able to articulate his pathway to offending, exhibited empathy and was remorseful for his offending.

22. The Judge accepted, at [30]:

> "30. ... I accept the submission that the appellant has demonstrated genuine commitment to avoid further criminal conduct. I have regards to the previous proceedings where it was submitted that the appellant was a persistent offender who associated with others involved in very serious criminal activity. Whilst his offending history is serious, most of the offences were committed as a juvenile or young person. I consider that the lifestyle demonstrated in the previous appeal is far different to the current circumstances before me. I do not find that the appellant constitutes a danger to the community".

Refugee Convention and Article 3 ECHR

23. The Judge did not accept, to the lower standard, that the claimant was at real risk of persecution consequent to re-trafficking from Nigeria following his return to that country, or that he would suffer ill-treatment breaching his protected article 3 rights, at [31]–[33].

Article 8

24. The claimant's appeal was allowed on human rights (article 8 ECHR) grounds, the judge finding that it would be unduly harsh for T to be

separated from her father. In reaching this conclusion, the Judge considered a report prepared following an assessment by an Independent Social Worker, Sophia Madziwa, dated 15 September 2022.

25. The Judge concluded that it was not reasonable for T, a British citizen, to leave the United Kingdom and reside with her father in Nigeria. She continues to see her mother in this country, and they have a relationship. The child resides with the claimant and her maternal grandmother, with close family members nearby. She is settled in school and lives in a stable environment. The Judge therefore found in favour of the claimant as to "the go scenario", at [36] of the decision. As for the "stay scenario", the Judge found that it would be unduly harsh for T to be separated from her father, at [41]-[44].

Grounds of Appeal

26. The Secretary of State advances two broad challenges:

(i) Inadequate reasoning as to why the decision to deport would result in unduly harsh consequences to T: Exception 2, section 117C(5) of the 2002 Act;

(ii) A failure to resolve the disputed issue of whether the claimant could reintegrate within Nigeria without experiencing very significant obstacles were he to be deported: Exception 1, section 117C(4) of the 2002 Act.

27. In respect of (i) the grounds detail that the Judge conflated the best interests of T with the unduly harsh test, despite the two being legally distinct. Additionally, it is contended that in relying upon Ms Madziwa's report the Judge failed to adequately examine and detail the 'exact current circumstances' of T and instead relied upon speculation. Complaint is made that the report is based upon interviews with family members, who are not impartial.

28. We address ground (ii) below, but at its core the Secretary of State contends that the Judge failed to appropriately consider whether the claimant could be considered socially or culturally integrated within the United Kingdom consequent to his offending when allowing the appeal under Exception 1.

29. Upper Tribunal Judge Pickup granted the Secretary of State permission to appeal by a decision sent to the parties on 13 March 2024 reasoning, inter alia:

> "5. It is at least arguable that the reasoning at [44] of the decision supporting the conclusion of unduly harsh consequences for the child is flawed as the judge appears to have conflated 'best interests' with 'unduly harsh'.
>
> 6. It is also arguable that the First-tier Tribunal Judge has made a material misdirection in relation to the issue of very significant obstacles to integration (in Nigeria), and in relation to whether he

> is socially and culturally integrated in the UK, despite his extensive criminal record of offending, and despite the findings rejecting the claim of a risk of re-trafficking".

Discussion

30. At the outset we observe that the First-tier Tribunal is an expert Tribunal charged with administering a complex area of law in challenging circumstances, and so the Upper Tribunal should approach appeals from the First-tier Tribunal with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the First-tier Tribunal will have got it right: *AH (Sudan) v. Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 AC 678, per Baroness Hale at [30].

31. We note the observation of Lord Hope in *R (Jones) v. First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, at [25], that it is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The Upper Tribunal, as an appellate body, should not assume too readily that the First-tier Tribunal misdirected itself just because not every step in its reasoning is fully set out in it.

32. Turning to ground (i) section 117C(5) of the 2002 Act provides:

> 'Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.'

33. In *KO (Nigeria) v. Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273, at [20]-[23], the Supreme Court confirmed that 'unduly harsh' introduced a higher hurdle than that of 'reasonableness' under s.117B(6) of the 2002 Act. 'Unduly' implied that there is a level of harshness that is acceptable in the relevant context. The relevant context is the public interest in deporting foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with a parent's deportation. The determination does not require a balancing of relative levels of severity of the parent's offence, other than was inherent in the distinction drawn regarding length of sentence.

34. *KO (Nigeria)* requires a comparison between the level of harshness justifiable in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness connoted by 'unduly harsh'. Harsh denotes something severe or bleak, and "unduly" raises that elevated standard still higher: *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 W.L.R. 3784.

35. There is no notional comparator which provides the baseline against which undue harshness must be evaluated: *Sicwebu v Secretary of State for the Home Department* [2023] EWCA Civ 550, [2023] Imm AR 1177.

36. Before us Ms McKenzie succinctly identified in respect of ground (i) that it was important for the Secretary of State to know what facts were relied upon and the reasons for the conclusion by the Judge that it would be unduly harsh for T to be separated from the claimant. She concentrated on [44] of the Judge's decision, submitting that the Judge had failed to expressly identify that she was applying an elevated test and had not considered whether the circumstances for the child were 'bleak'. The Secretary of State's position was that the reasoning of the Judge was inadequate.

37. There was no reliance upon the Judge having speculated upon T's circumstances. We consider Ms McKenzie was correct not to advance this element of the grounds. There was sufficient and adequate evidence before the Judge confirming that the child lives with her father and maternal grandmother, and that her father is her primary carer. Her mother recognises her father as holding that role.

38. We observe [44] of the decision:

> '44. At section 117C(3) in the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh. I am satisfied that if the [claimant] is deported this separation from her primary carer, is not in the best interests of [T]. It would have a detrimental impact on [T] that is not justified when considering that 10 years has passed since the [claimant's] last offence. The [claimant] has proved himself to be a steady and positive presence for most of her life. The effect of her father's deportation would be unduly harsh.'

39. Having carefully considered the Judge's decision and observing that she undertook a holistic assessment we consider the Secretary of State's challenge on this ground to be unsustainable. The decision is properly to be read as a whole, and relevant to the Judge's consideration of the 'stay' scenario are [41] - [43] of the decision.

40. In respect of the Independent Social Worker, Ms Madziwa, the Secretary of State did not challenge her expertise before the Judge, nor complain that she was inappropriately influenced by the information presented by family members. Ms McKenzie did not pursue this element of the grounds and we consider she was correct to adopt this position. In the circumstances, the Judge could properly place the expert opinion of Ms Madziwa into her assessment, as she did at [41]-[42]:

> "41. ... [T] has developed a very close relationship with her father. Her grandmother says that she adores her father. He is a hands-on father. From the time he became part of the household he took over her care and this is continued. It also allowed the grandmother to increase her working hours. He has become [T's]

> main carer with her support. This is confirmed by [T's] mother. She explained that the [the claimant] has a closer relationship with [T] than herself and considers it in [T's] best interest for her father to remain part of her life. She recalled how [T] would scream for her father when she suddenly did not see him when he was sent to prison. She is worried about her daughter's mental health should her father be removed from her life. She considers that would be catastrophic for [T].
>
> 42. Ms Madwiza saw very positive interactions amongst the household members which is evidenced by her living in a loving and caring family home with her father being her main carer [11.10 -11.15]. She concludes that *'There is no doubt that [T] has a very close bond with her father. Should she be separated from him she will experience significant loss in her life. This will have a detrimental impact on her emotional health and behaviour".* [11.16]*. Family life for [T] would be significantly disrupted should her father be deported to Nigeria. Whilst it could be argued that social media can facilitate communication, it is my view that this would not meet channels needs having known her father all her life and her father being her main carer since he was released from prison'... Removing [the claimant] from the United Kingdom would refuse [T] an opportunity to continue having a healthy and positive relationship with her father. The close and loving connection [T] has with her father would be severed. This would be unduly harsh".* [13.07]*. Separating [the claimant] from [T] would have a detrimental impact on her emotional well-being. She would be distressed and it his likely she would be stressed, confused angry and this can lead to challenging behaviours".* [14.4]."

41. We consider that the Judge could reasonably conclude that T's mother was being honest when describing her concerns that the claimant's removal from her daughter's life would be catastrophic. T's mother expressed her worries about her daughter's mental health if she were to be separated from the claimant. The Judge gave cogent reasons for accepting Ms Madziwa's evidence or opinion that the child would experience significant loss in her life if separated from her father, which would have a detrimental impact on her emotional health and behaviour. Additionally, there is no challenge to the Judge's conclusion that the circumstances in this matter are unusual and that despite their separation whilst the claimant was in prison, in the years since his release from prison he had been a constant factor in her life, the child was growing up and developing satisfactorily with no concerns, was a happy and contented young child and was meeting her developmental milestones. It was reasonably open to the Judge to conclude that the claimant was helping to secure stability in her life.

42. We are satisfied that the Judge did not conflate the unduly harsh test with an assessment of T's best interests. The latter was simply one of many findings placed into the assessment, as is clear whether [41]-[44] are considered in the round.

43. We are satisfied that having heard submissions from the parties on the principles established by the Supreme Court in *HA (Iraq)* that the Judge

had firmly in mind the relevant guidance. She was not required to spell out the guidance but was simply required to apply it. We can identify no express misdirection as to the test for 'unduly harsh'. The Judge recognised that the circumstances were unusual and accepted that the claimant's deportation would be 'catastrophic' for the child. We conclude that the common understanding of catastrophic – great damage or suffering – is such as to denote a circumstance for a child that is elevated beyond severe or bleak. It is upon this assessment that the Judge concluded that it would be unduly harsh to separate father and daughter.

44. We are satisfied that the Secretary of State's focus upon [44] establishes a failure to adequately consider relevant findings made elsewhere underpinning the conclusion that the appellant's deportation would be unduly harsh upon his daughter. Adequate and lawful reasons have been provided enabling the Secretary of State to understand why he lost in this matter.

45. In these circumstances we do not consider the Secretary of State to have made out his challenge. We confirmed our decision on ground 1 at the conclusion of the hearing.

46. Ms McKenzie properly accepted that the Secretary of State was required to succeed on both ground 1 and 2, and a failure to succeed on ground 1 resulted in the Judge not having materially erred in law in her decision. We consider that Ms McKenzie was correct in adopting this position.

47. However, we proceed to consider ground (ii) as it was argued before us. It is purportedly concerned with the Judge's conclusion in respect of section 117C(4) of the 2002 Act, Exception 1:

> Section 117C(4)
>
> (4) Exception 1 applies where -
>
> (a) C has been lawfully residence in the United Kingdom for most of C's life,
>
> (b) C is socially culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported. '

48. We consider ground (ii) as advanced to be very concerning. This is evident from the first two and the final paragraphs of the written grounds:

> 'a) It is respectfully submitted that the FTTJ's findings have not resolved the disputed issue of whether the appellant could reintegrate within Nigeria without experiencing very significant obstacles were he to be deported, or whether the appellant could be considered socially or culturally integrated within the UK as a result of his offending. This is a material consideration with regard to Exception 1 within section 117C(4) but appear to have been

overlooked when the FTTJ has made findings regarding Exception 2, which are disputed in Ground 1.

b) The FTTJ has rejected the appellant's risk of re-trafficking if returned to Nigeria, at [31-33], which the SSHD submits should be preserved if permission to appeal is granted, and it is argued that this would mean the appellant would not be disadvantaged if returned, considering the fact that he is a fit, young and otherwise healthy man, as stated in the reasons for refusal letter.

...

e) It is therefore respectfully submitted. That the FTTJ has failed to adequately reason why the continued presence of the appellant within the UK satisfies Exception 1 of s117C(4)(c).

49. The Judge did not consider Exception 1. She did not allow the human rights appeal on Exception 1 grounds. The claimant did not identify reliance upon Exception 1 in the skeleton argument prepared by Mr Moriarty, dated 31 May 2023. We have been provided with no evidence that the claimant relied upon Exception 1 before the Judge. Further, Exception 1 and Exception 2 are mutually exclusive and self-contained: *KO (Nigeria)*, at [22]. The relevant test from one does not flow into the other. Considering Ms McKenzie's submission, it may well be that the Secretary of State's attention was drawn towards [32] of the decision where the Judge found that the claimant would find it extremely difficult to adjust to life in Nigeria. However, this finding was made in respect of the article 3 appeal where the claimant was unsuccessful. It formed no part of the Judge's article 8 consideration.

50. To the extent that the Secretary of State challenges a positive finding by the Judge that there would be significant obstacles to his integration on return to Nigeria in respect of Exception 1 we consider it to be nonsensical.

51. No doubt trying to make sense of a ground upon which permission to appeal was granted, Mr Moriarty formulated by means of his rule 24 response a defence founded upon [45] of the Judge's decision and the assessment of very compelling circumstances under section 117C(6) of the 2002 Act. However, it is clear to us that this paragraph is not the focus of the Secretary of State's challenge. There is no merit to this ground, and it is dismissed.

Notice of Decision

52. The making of the decision of the First-tier Tribunal promulgated on 31 August 2023 did not involve the making of a material error of law. The appeal is dismissed.

53. An anonymity order is made.

D O'Callaghan
Judge of the Upper Tribunal

Immigration and Asylum Chamber

26 April 2024